

*Eldon*, sufficient to raise a trust in *Paine vs. Hall*, 18 Ves., 475, still this bill cannot be maintained, because, as I read the evidence, there is no proof of an assurance by Beale Gaither, either by express or silent assent, that if the testator would not make the provision set up by the bill, he would nevertheless execute his intentions as though he had made it. There is some proof, to be sure, that Gaither, the elder, advised the testator in regard to his will, but there is none which establish the indispensable fact, that he assured him he would fulfil what the bill charges to have been his intention with regard to the plaintiff and his brother William Gaither, if he would execute such a will as he did execute. The proof on the part of the plaintiff, moreover, is far from being in harmony with itself, with reference to the time when the title of the plaintiff in the property should commence. It is said by one of the witnesses that Beale Gaither, the elder, was to hold the property until his sons should be old enough to take charge of and manage it themselves, whilst one of them (the elder Benson) says Gaither, the father, was to have a life estate, and upon his death it was to go to his sons.

The declarations, then, of Beale Gaither, as deposed to by the several witnesses, even including those that appear to have been made since his deed of 1840 (which are, however, clearly inadmissible), are in my judgment wholly insufficient to establish the plaintiff's title to relief. They are not only vague and indeterminate, but they do not show, what must be shown before the complainant can have a decree, that the provision in the will which he alleges the testator was about to make in his favor, was prevented by the assurance of the elder Gaither, either expressly made or tacitly affirmed, that he would execute his intention in that respect, whether inserted in the will or not.

But in addition to the proof of the declarations of Beale Gaither, the elder, the complainant relies upon the evidence of Joseph Cole, who speaks of declarations made by Daniel Lamborne, the draftsman, and one of the subscribing witnesses to the will, he being now dead. This proof is excepted to by